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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MALCOLM RAY SCOTT, Defendant and Appellant.	B210230 (Los Angeles County Super. Ct. No. TA081161)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotello, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant and defendant Malcolm Scott appeals from his conviction of first degree murder as an aider and abettor. Defendant contends the evidence did not support that he personally acted deliberately and with premeditation, and that the trial court's response to a jury question misled the jury concerning the elements of the offense. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Information*

Defendant and his former co-defendant, Patrick Floyd Gulledge, were charged in a one-count information with the murder of Omar Carrillo, in violation of Penal Code section 187, subdivision (a).[2] The information also alleged that a principal was armed with a handgun during the commission of the offense within the meaning of section 12022, subdivision (a)(1); that a principal personally and intentionally discharged the handgun causing great bodily injury and death within the meaning of section 12022.53, subdivisions (d) and (e)(1); that a principal personally and intentionally discharged the handgun within the meaning of section 12022.53, subdivisions (c) and (e)(1); and that a principal personally used a handgun within the meaning of section 12022.53, subdivisions (b) and (e). It was further alleged that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members.

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1 At defendant's request, we took judicial notice of the record in the prior appeal.

2 All undesignated statutory references are to the Penal Code.

B. *First Trial and Prior Appeal*

Following their initial trial, defendant and Gulledge were found guilty of first degree murder. As the jury further found "not true" that defendant had personally fired shots that killed or injured Carrillo, his guilt was necessarily based on aiding and abetting. By opinion and order dated September 27, 2007, we reversed defendant's conviction because one of the aiding and abetting theories presented to the jury -- specifically, that defendant could be guilty of felony murder for aiding and abetting Gulledge's robbery of the victim -- was not supported by substantial evidence that defendant joined the crime of robbery before the victim was fatally wounded. (See *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396 ["California courts have consistently stated that if the design to take property from the victim is formed after the victim had already been killed or mortally wounded, the felony-murder doctrine does not apply."].) Because the prosecution's alternate theory -- that defendant aided and abetted the murder of Carillo by joining in the crime before the victim was dead -- was supported by substantial evidence, we remanded for retrial. (See *People v. Celis* (2006) 141 Cal.App.4th 466, 473-474 ["In a simple murder case, . . . a person may aid and abet a murder after the fatal blow is stuck as long as the aiding and abetting occurs before the victim dies."].)

C. *Evidence Presented at the Second Trial*

1. *Prosecution Case*

On September 12, 2005, Elsa Perez was driving her car in the area of Compton Avenue and 92nd Street in Los Angeles. While stopped at a red light, she saw a group of African-American men standing near the corner. One of the men separated from the group, crossed the street and walked toward a Hispanic man, the victim Carrillo. The African-American man was tiptoeing and appeared

to be trying to sneak up on the victim. The men in the group appeared to be laughing. Perez continued driving. In her rearview mirror she saw all the men running. She made a u-turn and returned to the scene. As she approached the intersection for the second time, she saw Carrillo on the ground, lying face down. The backpack he had been wearing was in the middle of the street. Perez got out of her car to try to assist him. At that point, Carrillo was still alive, trying to breath.

Nadia Roman, who lived on Compton Avenue, was looking out her window and saw Carrillo walking on the sidewalk in front of her house. An African-American man crossed the street at a rapid pace toward Carrillo. The man was carrying a gun at his side. He said some words, of which Roman could make out only "you Mexican." Roman saw the man shoot the victim once, turn him over as he lay on the ground, say "FU Mexican," and shoot him twice more. The man retreated the way he came. Roman dropped to the floor and called 911.

Sisters Doris and Jacqueline Merida were traveling in an SUV on 92nd Street with their family at the time of the shooting. While the vehicle was stopped at a light, they both observed an African-American man cross the street and shoot Carrillo. Jacqueline saw the shooter standing with a group of African-American men prior to the shooting. After shooting the victim, the shooter flipped the victim over with his foot and shot him again. At that point, a second African-American man left the group and walked toward the victim. When the second man reached the middle of the street, near the Meridas' vehicle, he fired at Carrillo multiple times. The second man walked with a limp.[3] The second man looked directly at Jacqueline, who became afraid and told the driver to "go, go." Doris identified

[3] Evidence was introduced that defendant walked with a limp, and that he had been shot in the leg earlier that year.

defendant as the second shooter in a prior proceeding (the transcript was read to the jury), but was unable to identify him at the trial. Jacqueline identified defendant as the second shooter in a photographic lineup a few days after the incident. She also identified him at the trial.

Lanell Lewis, an acquaintance of defendant's, testified she was at a friend's home when the shooting occurred and denied she had seen anything. Previously, she had given a statement to police officers in which she had said that Gulledge shot the victim and took money from him. In court, she initially denied or could not remember making any statements to officers pertinent to the crime. She later testified that defendant's mother and brother convinced her to tell the officers that Gulledge committed the crime.[4]

In the recorded interview, played to the jury, Lewis said she, "John Rock,"[5] Gulledge and defendant were standing together in front of an apartment building. Gulledge left the group, crossed the street and shot the victim three or four times, after saying "F-Mexican, F-Mexican." Gulledge had his gun out before he crossed the street. After shooting the victim, Gulledge took money out of the victim's pocket and ran. Lewis said in the interview that defendant did not do anything and did not have a gun.

Detective John Skaggs testified that Lewis had previously identified Gulledge in a photographic lineup. Detective Skaggs searched Scott's residence three days after the shooting. He found photographs of individuals, including

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[4] Lewis confirmed that while testifying in a prior court proceeding, she had seen a man wearing a t-shirt that read "Stop Snitching" and "Snitches Get Stitches," which she took as a warning.

[5] Lanell later identified John Rock as defendant's brother, Jonathan Hunt.

Scott, making gang signs. The detective also searched Gulledge's residence. There, he found a .22 caliber bullet.

George Diamond, an acquaintance of defendant's and a member of the Grape Street gang, testified that defendant had been shot in the leg or foot, but could not remember when this occurred. Diamond denied ever telling detectives that defendant walked with a limp or carried a .22 handgun. The prosecution played a tape of a September 2005 interview in which Diamond said that defendant walked with a limp and carried a "deuce-deuce."

The deputy medical examiner testified that Carrillo was shot three times, twice in the back and once in the front. All three wounds were fatal. The medical examiner recovered three small caliber bullets (.22 or .25 caliber) from the body.

Officer Roberto Bourbois, the prosecution's gang expert, testified that Grape Street was a criminal street gang with over one thousand members.[6] The members used common signs, symbols and colors. The gang's primary activities were narcotic sales, street robberies, shootings and murder. The corner of 92nd Street and Compton Avenue was within its claimed territory. Officer Bourbois identified two predicate activities committed by known gang members: a 2003 robbery and a 2004 robbery. He testified that in 2005, Grape Street was engaged in a feud with Florencia, a primarily Hispanic gang, and that there was a racial component to their animosity. There had been numerous gang-related shootings near the corner of Compton Avenue and 92nd Street.

Officer Bourbois testified that gang members who commit violent crimes on behalf of a gang benefit their gang by enhancing its reputation for violence and

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[6] The prosecution presented evidence that in April 2005, defendant told an officer that he was member of Grape Street. Defendant testified that he was a member of the Hat Gang and that Gulledge was a member of Grape Street. Officer Bourbois testified that Grape Street and the Hat Gang were associated or allied. He expressed the opinion that defendant was a member of the Hat Gang and an associate of Grape Street.

sending a message to rivals about its willingness to protect its turf. Members who use guns to shoot or rob assist the gang by intimidating the community and facilitating future crimes. Gang members rely on fellow gang members to protect them, act as lookouts and assist in the commission of crimes. Based on a hypothetical that tracked the evidence in the case, Officer Bourbois expressed the opinion that the shooting of Carrillo was committed for the benefit of a criminal street gang. He further opined that the second shooter was there to act as a lookout, "protect the back" of the shooter and "send[] a message" to potential witnesses.

2. *Defense Case*

Defendant's mother, Denise Jackson, testified that she spoke with Lanell Lewis and her cousin at the request of a police officer or detective to determine whether they were willing to give statements.[7] Jackson denied telling them what to say. She admitted that defendant asked her to contact an uncle and urge the uncle to tell police he was with defendant at a Sizzler restaurant on the day of the shooting.

Defendant, testifying on his own behalf, stated that on September 12, 2005, he was on 92nd Street in front of his apartment building with his brother, Lewis and two or three other people, mostly female. Defendant denied being armed. Gulledge was present, standing a little apart from the group. Defendant did not talk to Gulledge. Defendant saw Gulledge draw a gun, move quickly toward the victim and say something to him. The victim kept walking and Gulledge shot him in the back. Gulledge shot again and the victim fell to the ground. Gulledge turned Carrillo over with his foot and shot again. Gulledge then stole Carrillo's

[7] Lewis's cousin, Lionesha Lewis, testified at the first trial.

wallet. As Gulledge was running away, he fired another two shots in the direction of a vehicle which was stopped on the street.

After the shooting, defendant retreated to his apartment. He denied stepping out into the street and firing a gun. When arrested, defendant made up the story about being at a Sizzler restaurant with an uncle during the shooting because he did not want to become involved or be a snitch. Defendant admitted asking someone to instruct his uncle to say they had been at a Sizzler together.

D. *Closing Argument*

In closing, the prosecutor explained to the jury that as Gulledge was the actual shooter, defendant could be found guilty only as an aider and abettor. The prosecutor argued that the crime was first degree murder because defendant "saw Gulledge shoot and rob [Carrillo]" and that defendant "walked into this intersection, while people were watching, took out a gun, [and] fired in the direction of this young man that's lying on the ground." The prosecutor noted that defendant had admitted in his testimony that he had "watched Gulledge produce a gun as he snuck up on [Carrillo]" and "watched [Gulledge] shoot, rob, kick, and shoot the victim again." The prosecutor noted that Carrillo was still alive when defendant acted and argued that whether defendant's reasons for acting were "[t]o finish [Carrillo]," "[t]o hit him again," "[t]o scare witnesses off," "[t]o back up another gang member," or "[t]o show that particular community that gang members can shoot at people in public without fear of consequences," he was guilty of Carrillo's first degree murder.

Defense counsel urged the jury to believe Lewis and defendant, both of whom testified that defendant did nothing but observe the shooting. Alternatively, defense counsel argued that the actions of the second shooter described by Doris and Jacqueline Merida did not aid and abet Gulledge.

E. *Jury Instructions and Deliberations*

The jury was given the CALCRIM instructions on malice[8] and premeditation.[9] The jury was also instructed in accordance with CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it." The court further instructed the jury in accordance with CALCRIM No. 401: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

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[8] "To prove that the defendant is guilty of [murder], the People must prove that: 1. The defendant committed an act that caused the death of another person; and [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. The defendant acted with implied malice if: 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; and [¶] 4. He deliberately acted with conscious disregard for human life." (See CALCRIM No. 520.)

[9] "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death." (See CALCRIM No. 521.)

During its deliberations, the jury sent several notes to the court, two seeking readbacks of testimony and one asking whether votes should be by private ballot. In another such note, the jury asked the court for "[c]larification on what the [P]eople must prove," specifically: "[Do the] People have to prove all 4 [referring to CALCRIM No. 401] or any one of the four?" The court responded: "All 4 elements." The next day, the jury asked: "Is there a point in time prior to [the] crime when we must decide when defendant knew the intent of [the] perpetrator." The court responded: "Read instruction 401 (including element 2) very carefully. The word 'prior' is not there. You decide how to apply this instruction."[10]

F. *Verdict and Sentencing*

The jury convicted defendant of first degree murder and found the firearm and gang allegations true. The court sentenced appellant to 25-years-to-life for murder and 20-years-to-life for the section 12022.53, subdivision (c) allegation, plus one year to run concurrently for the section 12022, subdivision (a)(1) allegation.

DISCUSSION

A. *Premeditation*

Defendant contends that the evidence does not support his conviction for first degree murder because there was insufficient evidence he formed the intent to aid and abet a premeditated and deliberate first degree murder. We disagree.

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[10] There is no record of any discussions of the juror questions by the court and counsel. The settled statement obtained by defendant states: "[D]uring jury deliberations, counsel were advised as to the jury's requests, including[] questions and readback . . . ." The settled statement does not reflect whether counsel objected to the court's response to the jury's questions.

When determining whether the evidence is sufficient to sustain a criminal conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667, italics deleted, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts." (*People v. Holt*, *supra*, at p. 667.) "We draw all reasonable inferences in support of the judgment. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

An intentional killing is premeditated and deliberate "if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "'Deliberation'" refers to "careful weighing of considerations in forming a course of action" and "'premeditation'" means "thought over in advance. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) However, the requisite reflection to support deliberation and premeditation "need not span a specific or extended period of time." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) "'"The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]'" (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1080, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 767.) In *People v. San Nicolas*

(2004) 34 Cal.4th 614, the defendant, while cleaning up from killing the first victim, spotted the second victim in a reflection in the mirror and immediately turned and stabbed her. The Supreme Court held that because "[t]he act of planning -- involving deliberation and premeditation -- requires nothing more than a 'successive thought[] of the mind,'" the brief period between defendant's seeing the second victim's reflection and stabbing her was "adequate for defendant to have reached the deliberate and premeditated decision to kill [her]." (*Id*. at pp. 629, 658, quoting *People v. Sanchez* (1864) 24 Cal. 17, 30.)

With respect to defendant's culpability, an aider and abettor is one who, """acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime."""" (*People v. Jurado* (2006) 38 Cal.4th 72, 136, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "Mere presence at the scene of a crime" is not sufficient to establish aider and abettor culpability. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529.) Nor is "the failure to take action to prevent a crime . . ." or "knowledge of another's criminal purpose," in the absence of evidence of shared purpose or intent to "commit, encourage, or facilitate the commission of the crime." (*Id*. at pp. 529-530.)

To support a finding of guilt for first degree murder on an aider and abettor theory, the prosecution may not rely on the mental state of the actual perpetrator to support intent, malice or premeditation. In *People v. McCoy* (2001) 25 Cal.4th 1111, where the defendant was found guilty of first degree murder on an aiding and abetting theory, the Supreme Court explained: "[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.] Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.' [Citation.]

This description is accurate as far as it goes. But . . . the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*Id*. at p. 1117.) "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea." (*Id*. at p. 1122.) The aider and abettor "is liable for [his or] her own mens rea, not the other person's." (*Id*. at p. 1118; accord, *People v. Concha* (2009) 47 Cal.4th 653, 665 ["[A] defendant charged with murder or attempted murder can be held vicariously liable for the actus reus of an accomplice, but, for murder, a defendant cannot be held vicariously liable for the mens rea of an accomplice."].)

Defendant contends the evidence of premeditation and deliberation was insufficient because there was no evidence of joint planning prior to the killing, no evidence that Gulledge said anything before leaving the group and heading towards Carrillo, and no evidence that defendant did anything to encourage Gulledge.[11] As the Supreme Court made clear, the issue is whether defendant personally premeditated and deliberated before he acted, not whether he engaged in planning with an accomplice before the crime commenced. Jacqueline Merida testified that defendant produced a weapon and shot at the victim multiple times after Gulledge

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[11] Defendant further notes that there was no evidence he knew the victim or had any preexisting motive to kill. The gang expert's testimony established the existence of racially-motivated hostility between Grape Street and Florencia and that defendant and Gulledge were members of or associated with Grape Street. The appropriate mental state for first degree murder can exist where the perpetrators did not know the identity of the victim, but planned to assault anyone encountered or anyone who met certain criteria. (See, e.g., *People v. Moore* (2002) 96 Cal.App.4th 1105, 1111, 1113-1114; *People v. Rand* (1995) 37 Cal.App.4th 999, 1001.)

shot him and before Carrillo expired. The evidence presented supported that defendant had adequate time to reflect while watching Gulledge draw his weapon, cross the street, verbally confront Carrillo, shoot him in the back, turn him over, shoot him again, and rifle through his belongings in order to rob him. Having observed all of Gulledge's actions, defendant chose that moment to join in the crime, drawing his own gun, approaching Carrillo and shooting at him.[12] Although the first jury found the evidence insufficient to establish that defendant's bullets struck Carrillo, his actions had the effect of causing bystanders such as the Merida sisters, who might otherwise have assisted Carrillo, to flee. As we stated in our prior opinion, because defendant's actions "dissuaded anyone from going to Carrillo's aid or attempting to prevent Gulledge's escape," there was substantial evidence that he aided and abetted Gulledge's murder of Carrillo. On this record, the jury could reasonably have found that defendant, having had sufficient time for deliberation and premeditation, facilitated Gulledge's completion of a first degree murder.

B. *Jury Question*

During deliberations, the jurors asked whether they must find there was a point in time "prior to the crime" that defendant became aware of or "knew" Gulledge's intent. The court instructed the jurors to "[r]ead instruction 401 (including element 2) very carefully," pointing out that "[t]he word 'prior' is not

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[12] We note that defendant's actions clearly demonstrated an intent to kill and malice. (See *People v. Smith* (2005) 37 Cal.4th 733, 741, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 ["'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ."'"]; *People v. McCoy, supra,* 25 Cal.4th at p. 1123 ["Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice."].)

there" and that the jurors must decide "how to apply th[e] instruction." Defendant contends the trial court's answer to the jury question was erroneous and violated his right to have the jury properly instructed on every element required to support a conviction.

Citing *People v. Dykes* (2009) 46 Cal.4th 731, 802, respondent contends the issue was forfeited: "When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal." Respondent notes that the record before us, specifically, the settled statement, fails to establish that defendant objected below. Defendant counters that the settled statement does not reflect whether counsel raised an objection and that in any event, the court's response represented instructional error that affected his substantive rights, which must be addressed without regard to whether an objection was raised below. (See *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249 ["[A]n appellate court may ascertain whether the defendant's substantial rights will be affected by [] asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court."].)

We need not resolve whether the issue was forfeited because the trial court's response to the jurors was a correct statement of law that could not have misled the jury and does not represent ground for reversal. Defendant contends the response was incorrect because it was "inconsistent with the requirement [defendant] knew Gulledge's intent prior to the murder." An aider and abettor is guilty of the crimes committed by the principal as long as he or she forms the intent to render aid and joins in the crime *during* its commission. (See, e.g., *People v. Hernandez* (2010)

181 Cal.App.4th 1494, 1502 ["In order for aiding and abetting liability to attach, the intent to render aid must be formed prior to or during commission of the offense."]; *In re Malcolm M.* (2007) 147 Cal.App.4th 157, 171 ["[A]n intent to help the perpetrator get away, formed before cessation of the acts constituting the felony, constitutes aiding and abetting."].) As stated in our prior opinion, "[b]ecause the crime of murder is not complete until the victim is dead, a person who helps the principal to escape or otherwise facilitates or supports the crime while the victim lays dying can be guilty of simple murder under an aiding and abetting theory." (See *People v. Celis*, *supra*, 141 Cal.App.4th at pp. 473-474; *People v. Esquivel, supra*, 28 Cal.App.4th at p. 1397 ["[A] murder ends with the death of the victim."].)

The evidence presented established that both Gulledge and defendant acted with the requisite mens rea to support their convictions for first degree murder: Gulledge spotted Carrillo from across the street, drew his gun, sneaked up on him, verbally confronted him, and shot him several times in the front and back. Defendant, fully cognizant of Gulledge's murderous conduct, and with ample time to reflect and deliberate, joined in the crime while the victim lay bleeding to death. Defendant's supportive actions thus occurred during the commission of the crime of first degree murder. By advising the jurors to focus on the words of CALCRIM No. 401, the court properly directed them away from any potential misperception that defendant's intent prior to Gulledge's initiation of the crime was significant. As the instruction states, defendant's intent *during* the crime's commission could properly support a finding of guilt on an aiding and abetting theory. The absence of evidence that defendant was aware of Gulledge's intent *before* Gulledge drew his gun and shot Carrillo does not alleviate his responsibility for the murder. In sum, we find no error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.